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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 194...

EDWARD J. LINNENBRINGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. [redacted] 149

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

ROSCOE ANDERSON,
705 Olive Street,
St. Louis 1, Missouri,
Attorney for Petitioner.

Of Counsel:
WILLIAM WAYE, JR.,
First National Bank Building,
St. Charles, Missouri,
W. R. GILBERT,
705 Olive Street,
St. Louis 1, Missouri.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477

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UNITED STATES OF AMERICA,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now Edward J. Linnenbringer and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit rendered on the 9th day of April, 1946, reversing the judgment of the District Court of the United States in and for the Eastern Judicial District of Missouri in said cause in favor of this petitioner and against the respondent herein, which said judgment of the said Circuit Court of Appeals became final on the 30th day of April, 1946, by the overruling by that Court of petitioner's petition for rehearing.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered April 9, 1946 (R. 305). The Petition for Rehearing was denied April 30, 1946 (R. 341). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, ch. 229 (28 U. S. C. A., Sec. 347, 8 F. C. A., Title 28, Sec. 347).

QUESTIONS PRESENTED.

(1) Whether there is not a conflict between the decision of the Circuit Court of Appeals in the instant case and a decision of the Circuit Court of Appeals of the Fifth Circuit in United States v. Baugh, 149 F. (2d) 190. In this case it was held that a landowner in a proceeding instituted by the United States pursuant to the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C., Section 258 a, was not entitled to interest upon the difference between the amount deposited in the registry of the District Court as the estimated just compensation and the amount ultimately awarded the landowner, which amount was based upon the agreed purchase price of the land fixed by a contract and was the amount the United States moved the District Court to fix as compensation for the land; and this case held that the price of the land had been fixed by contract and that interest could not be allowed for delay in the performance of a contract or obligation of the United States. The decision of the Circuit Court of Appeals for the Fifth Circuit in United States v. Baugh, 149 F. 2d 190, held that interest was allowable to the landowner in a condemnation proceeding instituted by the United States pursuant to the Second War Powers Act, 50 U. S. C. A., Appendix, Sec. 632. The interest allowed

was based upon delay of seven months in depositing in court the amount the owner had agreed to accept as just compensation in a contract between the United States and landowner.

(2) Whether the Circuit Court of Appeals has not decided a federal question in conflict with the decision of this Court in Danforth v. United States, 308 U. S. 271. The Circuit Court of Appeals in this condemnation proceeding, instituted by the United States pursuant to the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a, after it had repudiated a now admittedly valid and binding option contract, held that the landowner was not entitled to interest on the undeposited amount of value as provided in that Act because the landowner "converted the condemnation proceeding into one controlled * * * by the terms of the purchase contract," and that interest cannot be added to an obligation of the United States. This Court in Danforth v. United States, supra, reversed the holding of the Circuit Court of Appeals for the Eighth Circuit that a landowner could not in a condemnation proceeding have the value as agreed in a purchase contract accepted as the value in a condemnation proceeding, but had to bring action on the contract under the Tucker Act, Judicial Code, Sec. 24 (20), 28 U. S. C. A., Sec. 41 (20), and this Court held that in such a situation the provisions of the condemnation act invoked by the Government controlled the proceeding and not the Tucker Act, and that under jurisdiction invoked by the United States, the procedure provided by the statute on condemnation must govern, and that the condemnation action was not a suit on a contract.

(3) Whether in this condemnation proceeding instituted by the United States pursuant to the Declaration of Taking Act, 40 U. S. C. A., Sec. 258a (where the purchase price of the land was fixed by a now admittedly valid and binding

option contract between the landowner and the United States and where the United States, after a delay of almost four years in paying a portion of the amount of the contract price into the registry of the District Court, moved that Court to fix the compensation of the landowner at such contract price), the decision of the Circuit Court of Appeals that the landowner was not entitled to interest upon the portion of the award not paid into the registry of the District Court at the time of taking for the reason that the allowance of interest would be tantamount to awarding damages against the United States for the delay in the payment of an obligation, is not in conflict with the applicable decisions of this Court in Jacobs v. United States, 290 U. S. 13; United States v. Rogers, 255 U. S. 163, and other condemnation cases holding that just compensation guaranteed by the Fifth Amendment of the Constitution includes not only the fair market value of the property at the time of taking but also includes additional compensation for the loss of the use of the land or its money equivalent.

(4) Whether a landowner can be deprived of interest as provided by the Declaration of Taking Act, 40 U. S. C. A., Sec. 258a, where the United States instituted condemnation proceedings pursuant to that Act, acquired title to the land pursuant to that Act but withheld a portion of an agreed purchase price fixed by an admittedly valid and binding contract from June 16, 1941 to May 17, 1945, at which date the United States paid into the registry of the District Court the balance of the value as fixed by the contract, after having, on April 6, 1945, moved the District Court to enter judgment in condemnation fixing the compensation of the landowner at the option contract price, on the ground that the landowner by successfully defending the option contract converted the adversary condemnation proceedings into an action on contract.

STATUTES AND CONSTITUTION INVOLVED.

The Constitutional Amendment involved is the Fifth Amendment to the Constitution of the United States, the pertinent part of which is:

> "No person shall be * * * deprived of life, liberty, or property without due process at ~~law; nor~~ shall private property be taken for public use, without just compensation."

The statutes involved are the Declaration of Taking Act, Feb. 26, 1931, c. 307, Sec. 1, 46 Stat. 1421, 40 U. S. C. A., Sec. 258 (a), and the Tucker Act, Judicial Code, Sec. 24 (20), 28 U. S. C. A., Sec. 41 (20).

The pertinent portion of the Declaration of Taking Act, 40 U. S. C. A., Sec. 258 (a), is as follows:

> "Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court."

The pertinent portion of the Tucker Act, 28 U. S. C. A., Sec. 41 (20), is as follows:

> "Sec. 41. The district courts shall have original jurisdiction as follows:
>
> * * * * * * *
>
> "(20) Suits against United States concurrent with the court of claims, of all claims not exceeding $10,000 founded upon the constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in court of law, equity or admiralty, if the United States were suable. * * *"

STATEMENT.

The United States of America, the Respondent herein, instituted proceedings by filing in the District Court of the United States for the Eastern District of Missouri a Declaration of Taking (R. 137) and a Petition in Condemnation (R. 129) pursuant to the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258 (a), to condemn certain land owned by petitioner.

Prior to the filing of the petition in condemnation certain transactions had transpired between the parties. On or about November 30, 1940, the petitioner and his wife granted the United States of America an option to purchase for the sum of $34,000.00 the real estate (including improvements) described in the petition in condemnation filed by the United States and on December 6, 1940, the United States by its duly authorized official, Col. R. D. Valliant, accepted said option (R. 151). This contract provided that the Government should have the right of immediate occupancy and use of the land for any purpose

from and after the acceptance by the Government of the option (R. 150-1).

The contract also provided that the landowners would deliver a general warranty deed conveying the fee simple title to the United States and that upon the furnishing of final certificate of title showing title to be vested in the United States, the Government would then pay the "agreed purchase price" to the landowners. It was further provided that (R. 151):

> "If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings."

Pursuant to the terms of this agreement, Edward J. and Emma Linnenbringer executed and delivered to the United States a warranty deed dated January 9, 1941, acknowledged by the grantors on January 13, 1941, whereby the real estate described in the petition in condemnation was conveyed to the United States (R. 151). The said deed was accepted by the United States and on the 7th day of February, 1941, it was filed for record in the Recorder's office of St. Charles County, Missouri, and was recorded in said office in book 197, page 177 (R. 151).

The Government took possession of the said real estate described in the petition in condemnation on or about January 13, 1941 (R. 151), and has since that time been continuously in possession of said real estate.

The United States thereafter repudiated said contract and commenced this adversary condemnation proceeding. On June 16, 1941 a "Declaration of Taking" (R. 137) was filed, signed by Henry L. Stimson, Secretary of War of the United States, in the District Court under the authority of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, Sec. 307, 40 U. S. C., Sec. 258a, and other condemnation statutes. The "Declaration of Taking" (R. 137) stated that the said lands (being the same land which the Government had taken possession of on or about January 13, 1941 pursuant to the purchase contract) were required for immediate use to provide a site of the Weldon Springs Ordnance Plant, that the estimated "just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto" was $16,000, which sum was deposited in the Registry of the District Court (R. 143). Then on June 18, 1941, the United States of America filed a "Petition in Condemnation" (R. 129) in the District Court in which it prayed, inter alia, that "The court will appoint three disinterested commissioners, qualified by law, to determine, assess, and award the value of the property proposed to be taken and other damages which may be sustained by the respective owners," that the "court will decree to this plaintiff the right of judgment in condemnation herein in fee simple as contemplated by the laws of Congress in this case made applicable," that "the court, upon the filing of this petition, will make an order pursuant to the Act of Congress approved February 23, 1931 (46 Stat. 1421), decreeing to the plaintiff the right to take immediate possession of said lands."

Also on June 18, 1941, the District Court entered an "Order and Judgment on Declaration of Taking" (R. 140), wherein it was ordered that title to said lands in fee simple absolute vest in the United States of America. The Order also provided that "the right to just compensation for

the property so taken is vested in the persons entitled thereto, and the amount of just compensation for said land involved in this condemnation proceeding, shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law."

On July 23, 1941, Edward J. Linnenbringer and his wife, Emma Linnenbringer, filed an answer (R. 143) to the petition in condemnation in which they alleged, inter alia, that the Government had accepted the option to purchase said land for the price and sum of $34,000.00; that pursuant to said contract they executed and delivered a warranty deed which was accepted by the Government and filed for record in the Recorder's office of St. Charles County, Missouri, book 197, page 177, and that pursuant to said contract the Government took possession of said land on or about January 13, 1941. It was also alleged that the United States of America was estopped by reason of the facts alleged to claim it was entitled to the appointment of commissioners and that it was estopped to proceed in the condemnation proceedings except in accordance with the contract. They also prayed that judgment be entered for $34,000.00, with interest from January 13, 1941, the date of possession, at the rate of 6 per cent per annum. Pending the litigation, Emma Linnenbringer died, and petitioner became the sole owner.

Then almost four years after the filing of the petition in condemnation, and after the decision in Muschany v. United States, 324 U. S. 49, on April 6, 1945, the Government filed a motion (R. 155) in which it moved "the court to enter judgment in this cause for condemnation of said real estate, fixing the compensation to be paid by the plaintiff to defendants in the sum of $34,000.00." In the motion the Government stated that the sum of $34,000.00 was "The amount of compensation fixed in said option contract" and that "the United States Supreme Court in the case of Muschany v. United States, 89 L. Ed., Adv. Op.

492 (1945), has held an option contract to be valid and binding, which option contract is identical with the provisions of the option contract in this case with the exception of the names of the owners, the description of the property and the amount of compensation."

Petitioner, Edward J. Linnenbringer, answered (R. 156) said motion and alleged, inter alia, that he (Emma Linnenbringer, his wife, having died) was "entitled to judgment in the said cause for the sum of $34,000.00 with interest on said sum at 6% per annum from the 13th day of January, 1941 to June 18, 1941, and interest on the sum of $34,000.00 less the sum of $16,000.00 deposited in the registry of this court on June 18, 1941, to-wit, the sum of $18,000.00 at 6% per annum from June 18, 1941 to date said entire sum is paid to this defendant."

RULINGS OF COURTS BELOW.

The District Court entered its opinion (R. 162) on June 8, 1945, and entered its findings and judgment (R. 180) on July 2, 1945 awarding the petitioner the sum of $34,000.00 as the price of the land along with $4,230.00, being the amount of interest at the rate of 6% per annum, which the Court held due the petitioner under the Declaration of Taking Act on $18,000.00 from June 18, 1941, the date of the deposit of $16,000.00, to May 17, 1945, the date when the $18,000.00 was deposited in the Registry of the Court. The $18,000.00 was the difference between $34,000.00, the price of the land fixed in the contract, and the $16,000.00 which was deposited in the Registry of the District Court as the estimated just compensation. Petitioner had sought interest from the date of actual taking of possession on January 13, 1941, but the Distrist Court ruled against that contention and held that interest should run from the filing of the Declaration of Taking and since the petitioner did not appeal from that holding he is bound by that portion of the findings and judgment.

On April 9, 1946, the Circuit Court of Appeals for the Eighth Circuit entered its judgment (R. 305) reversing the judgment of the District Court. In the opinion in this cause, the Circuit Court of Appeals referred to and adopted an opinion filed by it the same day in the case of Oliver v. United States (No. 13154 in the Circuit Court of Appeals). Petition for Certiorari in Oliver v. United States is being filed at the same time as this petition is being filed.

In that opinion (R. 296) the Circuit Court of Appeals held that the contract did not provide for the payment of interest, that the purchase price provided was "not merely the agreed fair value of the land" but "may be fairly regarded, at the very least, as the agreed equivalent of just compensation for the taking of land by condemnation or by purchase" (R. 302). It was held that: "By their successful defense of the validity of the purchase contract, the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled, as to the amount of their recovery, by the terms of the purchase contract" (R. 302). The Court further held that "in the absence of a statute or an express contract providing for it, interest cannot be added to an obligation of the United States," and that the allowance of interest upon the price "would be tantamount to awarding interest against the United States by way of damages for delay in the payment of an obligation, * * * interest does not run upon claims against the government even though there has been a default in the payment of the principal,' Smyth v. United States, 302 U. S. 329, 353" (R. 303).

The Circuit Court of Appeals further stated (R. 303) that it thought United States v. Baugh (C. C. A. 5th), 149 F. 2d 190, "may be distinguished * * * on the ground that the contract there involved was interpreted by the Court as fixing only the fair value of the land for the purpose of a condemnation then proceeding," but that: "If, however, this distinction is not warranted, we are unable to follow the decision of the Baugh case."

REASONS FOR GRANTING PETITION.

(1) The decision of the Circuit Court of Appeals in the instant case is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in United States v. Baugh, 149 F. (2d) 190. The Circuit Court of Appeals here held that the petitioner landowner could not, as a part of just compensation, receive interest on $18,000, being the difference between the agreed purchase price ($34,000) of the land (fixed in an admittedly valid and binding contract and for which amount the Government moved the District Court to enter judgment in condemnation fixing the compensation of the landowner at said agreed purchase price) and the amount deposited ($16,000) by the United States in the registry of the District Court as estimated just compensation pursuant to condemnation proceedings instituted under the Declaration of Taking Act, 40 U. S. C. A., Sec. 258a, even though there was a delay of almost four years in the payment of the said $18,000 into the registry of the District Court. The Circuit Court of Appeals endeavored to distinguish United States v. Baugh, 149 F. (2d) 190, where the Fifth Circuit allowed interest where the delay was seven months and where the contract between the Government and the landowner fixed the "just compensation", on the ground that the "contract there involved was interpreted by the Court as fixing only the fair value of the land for the purpose of condemnation then proceeding" but this Circuit Court of Appeals admitted that: "If, however, this distinction is not warranted we are unable to follow the decision in the Baugh case".

(2) The decision of the Circuit Court of Appeals is probably in conflict with the decision of this Court in Danforth v. United States, 308 U. S. 271, where this Court held

that in a condemnation proceeding instituted by the United States where the landowner sought compensation fixed in a contract between the Government and the landowner that the jurisdiction of the Court and the procedure was governed by the condemnation statute invoked by the Government and not by the Tucker Act, Judicial Code §24 (40), 28 U. S. C. A., §41 (20), and that the action was not one on a claim against the United States. The Circuit Court of Appeals in the instant condemnation proceedings, instituted and maintained by the United States pursuant to the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a, held that the landowner could not recover constitutional and statutory interest provided in that Act because the landowner sought an award of the valuation fixed in the contract between the Government and the landowner and that interest could not be allowed upon a claim against the Government.

(3) The decision of the Circuit Court of Appeals is probably in conflict with the decisions of this Court in Jacobs v. United States, 290 US 13, United States v. Rogers, 255 US 163, and other condemnation cases in which this Court has laid down the principle that just compensation guaranteed by the Fifth Amendment of the Constitution includes not only the fair market value of the property at the time of taking but also includes additional compensation, measured in interest, for the loss of the use of the land or its money equivalent. The Circuit Court of Appeals in the instant condemnation proceedings instituted by the United States pursuant to the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a, where there was a delay of almost four years in paying the landowner a portion of an agreed purchase price fixed in a valid and binding contract, held that the landowner could not recover interest on the amount withheld because the adversary condemnation proceedings had been con-

verted into an action on contract by reason of the landowner's seeking compensation of an award for the contract price and that the awarding of interest would be tantamount to awarding damages against the United States for the delay in the payment of an obligation.

(4) The question involved in this case is an important question of Federal law which has not been, but should be, decided by this Court. The Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a, provides that in proceedings instituted pursuant to its terms the landowner shall be awarded, as a part of just compensation, interest on the amount finally awarded as the value of the property from the date of taking to the date of payment except that interest shall not be awarded of so much thereof as shall have been paid into the Court. In the instant case the United States instituted condemnation proceedings pursuant to that Act, acquired title pursuant to that Act, but withheld a portion of an agreed purchase price fixed by an admittedly valid and binding contract from June 18, 1941 to May 17, 1945, at which date the balance was paid into the District Court. The landowner was denied interest as provided by the Declaration of Taking Act on the ground that since the price of the land was fixed by contract the action was converted into one on contract. This Court has not directly decided whether or not the fact that the value of the land is fixed by a valid and binding contract, instead of by commissioners, renders inapplicable the provisions of the Declaration of Taking Act requiring the payment of interest. This question is far reaching in its application and importance because during and preceding the past war the United States acquired vast areas of land by means of such option contracts and the present decision leaves in confusion the proper application of the Declaration of Taking Act.

CONCLUSION

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of the Court of Appeals for the Eighth Circuit be reviewed by this Honorable Court and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

ROSCOE ANDERSON,
705 Olive Street,
St. Louis 1, Missouri,
Attorney for Petitioner.

Of Counsel:

WILLIAM WAYE, JR.,
First National Bank Building,
St. Charles, Missouri,

W. R. GILBERT,
705 Olive Street,
St. Louis 1, Missouri.

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OCTOBER TERM, 194..

EDWARD J. LINNENBRINGER,
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vs.

UNITED STATES OF AMERICA,
Respondent.

No. .....

BRIEF

In Support of Petition for Writ of Certiorari.

OPINIONS OF THE COURTS BELOW.

The opinion (R. 162) of the United States District Court for the Eastern District of Missouri is reported in 61 F. Supp. 199. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in Oliver v. United States, which opinion was referred to and adopted as the opinion in this case, has not yet been reported, but appears on pages 294 to 303 of the transcript of the record filed herewith.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered April 9, 1946 (R. 305). The Petition for Rehearing was denied April 30, 1946. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, Ch. 229, Sec. 1, 28 U. S. C. A., Sec. 347, 8 F. C. A., Title 28, Sec. 347.

STATEMENT OF THE CASE.

For the sake of brevity, we refer to the preceding petition, pages 6 to 10, for statement.

ARGUMENT.

I.

There Is a Direct Conflict Between the Decision of the Circuit Court of Appeals in the Instant Case and the Decision of the Circuit Court of Appeals for the Fifth Circuit in United States v. Baugh, 149 F. (2d) 190, on the Question of Allowance of Interest to a Landowner in a Condemnation Proceeding Where the Value of the Land Is Fixed by Contract.

The Circuit Court of Appeals endeavored to distinguish the decision of the Circuit Court of Appeals for the Fifth Circuit in United States v. Baugh, 149 F. (2d) 190, "on the ground that the contract there involved was interpreted by the court as fixing only fair value of the land for the purpose of a condemnation then proceeding" (R. 303). The Circuit Court of Appeals evidently recognized that this distinction was not a valid one because it went on to say: **"If, however, this distinction is not warranted, we are unable to follow the decision in the Baugh case."** (Emphasis supplied here, and throughout this brief, unless otherwise specified.)

In United States v. Baugh, supra, the United States commenced condemnation proceedings under the Second War Powers Act, 50 U. S. C. A., appendix, Sec. 632, on August 24, 1942. Several months thereafter the owners of numerous parcels within the area entered into stipulations with the United States wherein the parties agreed upon certain sums as just compensation for the taking of their property. The various stipulations provided and agreed that the court was "authorized and petitioned to enter * * * final judgment and decree in said action in accordance with the prayer in plaintiff's petition herein, or any

declaration of taking which may hereafter be filed by the plaintiff, vesting the title to the above-described property in the United States of America, and adjudging **just compensation** for the lands taken to be the sum of * * *." The Government had taken possession of each tract of land slightly more than a year before any compensation was made available, and there was a delay of seven months after entering into the contract until the money was paid into the Court. The District Court allowed interest from the date of the stipulations to the date the money was deposited in the Court. The United States' only specification of error was that the allowance of interest "on the sums agreed upon by the parties as just compensation violates the terms of the agreements and the rule that interest does not run on contractual claims against the sovereign." The Circuit Court of Appeals for the Fifth Circuit in affirming the judgment of the District Court said at l. c. 192-193:

> "In the present case the Government did not take a deed from the landowner as in an outright purchase, but it acquired title and possession by condemnation. **The stipulation merely had the effect of relieving the Government from having to make proof as to what was just compensation** and of running the risk of having an amount fixed which might be unsatisfactory. The stipulations eliminated controversies, but otherwise the condemnation suit proceeded to final judgment. There is no mention in the stipulations that interest was, or was not, included. Just compensation in condemnation cases means just compensation at the time of taking possession, and when the parties reduced to writing a stipulation fixing just compensation there seems to be no reason to conclude that the landowner **impliedly** waived any legal right. In view of the several express waivers made in the writing it will not be presumed to have contained any implied waivers of substantial constitutional rights. Under the decisions cited above, the land-

owners had the constitutional right to receive not only just compensation but, where the taking precedes the payment, the landowner is also entitled to 'such addition as will produce the full equivalent of that value paid contemporaneously with the taking,' which additional value may be measured by the legal rate of interest, if reasonable, in the state where the property is located * * *.

* * * * * * *

"The landowners apparently were willing at the date of the agreements to accept the sums of money stipulated without past interest and expected the Government to make prompt payment of the amount agreed upon. But the Government failed to pay for seven or eight months thereafter, and there is neither proof nor presumption that the landowners intended to waive interest in the future, particularly for such an indefinite and unreasonable period, and such a waiver cannot be read into the agreement. **Their right to have interest is found in the Constitution and is neither found nor lost in the contract.**

"The Constitution no more permits the deprivation of the money equivalent of land taken without just compensation than it does the deprivation of the use of land without just compensation."

It should be noted that the stipulation involved in United States v. Baugh, supra, specifically designated the agreed sum as "just compensation." It provided that the court be authorized to enter final judgment "adjudging **just compensation** for the lands taken, to be the sum of * * *." The contract in the instant case did not fix, or endeavor to fix, "just compensation." At all times, the contract here involved (R. 149-151) fixed only the "**purchase price**" or "**agreed valuation**" of the land. This contract provided that the Government would pay the "agreed purchase price" to the landowner upon the furnishing of a certificate of title. The contract further provided:

"If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the ward at the **agreed valuation** * * * and will upon filing its petition in such proceedings deposit said agreed **purchase price** * * *."

The attempted distinction of United States v. Baugh, supra, by the Circuit Court of Appeals below becomes meaningless, and is clearly **not warranted**, when the express language of the option here involved, referring to the amount as the "agreed valuation" and "agreed purchase price" is read and compared with the language used in the stipulation and by the court in United States v. Baugh, which refers to the amount there involved as "just compensation."

The conflict between the decisions of the two Circuit Courts of Appeal is further revealed by the totally diverse interpretation given by each of the Courts to the fact that neither the stipulation nor option-contract contained express provisions for the payment of interest. In the instant case the Circuit Court of Appeals stated (R. 302):

"There is no provision in the contract for the payment of interest on the stipulated consideration, nor does the contract fix a time within which payment is required. * * * The purchase price stipulated in the contract is not merely the agreed fair value of the land made in contemplation of its acquisition by the United States through condemnation, but the agreed consideration to be paid the landowners by the United States for both the land and its exclusive possession and use from the effective date of the purchase contract until payment by the United States. The purchase price stipulated in the contract may be fairly **regarded**, at the very least, as the agreed equivalent of just compensation for the taking of the land by condemnation or by purchase."

The interpretation given by the Fifth Circuit in United States v. Baugh, supra, on precisely the same question is diametrically opposed and in direct conflict with that of the Eighth Circuit in the instant case. This is clear from the following language in that case (l. c. 192-193):

> "There is no mention in the stipulations that interest was, or was not, included. Just compensation in condemnation cases means just compensation at the time of taking of possession, and when the parties reduced to writing a stipulation fixing just compensation there seems to be no reason to conclude that the landowner **impliedly** waived any legal right. In view of the several express waivers made in the writing it will not be presumed to have contained any implied waivers of substantial constitutional rights. * * * The landowners apparently were willing at the date of the agreements to accept the sums of money stipulated without past interest and expected the Government to make prompt payment of the amount agreed upon. But the Government failed to pay for seven or eight months thereafter, and there is neither proof nor presumption that the landowners intended to waive interest in the future, particularly for such an indefinite and unreasonable period, and such a waiver cannot be read into the agreement. Their right to have interest is found in the Constitution and is neither found nor lost in the contract.
>
> "The Constitution no more permits the deprivation of the money equivalent of land taken without just compensation than it does the deprivation of the use of land without just compensation."

The Circuit Court of Appeals in the instant case was not willing to go so far as to say that the agreed purchase price, without interest, **actually** was just compensation. It said that such agreed purchase price "may be fairly regarded" as the equivalent of just compensation. In this way it indicates that it considers the landowner to have impliedly waived the constitutional right to interest as

well as its right to interest under the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a. The Fifth Circuit, on the other hand, (where the stipulation specifically designated the price as "just compensation" as contrasted with the contract here referring to it as the "agreed purchase price" or "agreed valuation") stated that there was no reason to conclude that the landowner "**impliedly** waived any legal right" and that "their right to have interest is found in the constitution and is neither found nor lost in the contract."

It is submitted that there is a direct, irreconciliable conflict between the decision of the Circuit Court of Appeals in the instant case and the decision of the Circuit Court of Appeals from the Fifth Circuit in United States v. Baugh, 149 F. (2d) 190, and that this Court should grant certiorari.

II.

The Holding of the Circuit Court of Appeals That the Landowner "Converted the Condemnation Proceedings from an Ordinary Adversary Proceeding Into One Controlled, as to the Amount of Their Recovery, by the Terms of the Purchase Contract" Is in Conflict With the Decision of This Court in United States v. Danforth, 308 U. S. 271, Holding That the Fact That a Landowner in a Condemnation Proceeding Sought Recovery in the Amount of the Value of the Land Fixed by Contract Did Not Constitute a Suit Against the Government Within the Terms of the Tucker Act, 28 U. S. C. A., Sec. 41 (20).

The Circuit Court of Appeals held that the landowner by insisting upon the validity of the purchase contract "converted the condemnation proceedings from an ordinary adversary proceeding into one controlled, as to the amount of their recovery, by the terms of the purchase

contract" (R. 302). From this that Court drew the conclusion (R. 302-303) that in the absence of a statute or an express contract providing for it, interest could not be added to such an obligation of the United States.

This holding is in direct conflict with the decision of this Court in Danforth v. United States, 308 U. S. 271. In the Danforth case the United States and Danforth, the landowner, entered into a contract whereby the United States agreed to pay a designated amount for a perpetual flowage easement over the landowner's land. Later the United States came to the conclusion that the contract price was in excess of the actual value so it repudiated the contract and commenced condemnation proceedings pursuant to the provisions of the Mississippi River Flood Control Act of May 15, 1928, 45 Stat. 534, 33 U. S. C. A., Sec. 702a et seq. The landowner in both his answer and in a counterclaim pleaded the contract and prayed judgment for the contract price along with interest. The Circuit Court of Appeals for the Eighth Circuit in that case (Danforth v. United States, 102 F. [2d] 5), held that the landowner's contention was founded upon an attempt to enforce a contractual obligation of the United States, which is the same holding that Court made in the instant case. From that holding the Circuit Court of Appeals in that case further concluded that the District Court did not have jurisdiction to consider the landowner's claim because the amount involved exceeded the jurisdictional amount of such claims which could be brought in the District Court by virtue of the provisions of the Tucker Act, Section 24 (20) of the Judicial Code, 28 U. S. C. A., Sec. 41 (20).

The Circuit Court of Appeals there gave two reasons for this conclusion, (1) that the United States was asserting a privilege inherent solely by virtue of sovereign power and not as a private suitor, and thus in no way waived immunity from suit, and (2) the landowner was clearly attempting to enforce a contract.

This Court, in Danforth v. United States, 308 U. S. 271, could not agree with that interpretation. It said, l. c. 282-283:

> "We construe the accepted offer as an agreement to fix the price at the named figure for the easement sought. Paragraph 3 of the letter shows condemnation was in mind.
>
> "This action is brought under the provisions of Sec. 4 of the Flood Control Act. The jurisdiction of the Court to consider the landowner's contention depends upon the language of that Act, not upon the Tucker Act on the general statute on condemnation. We have no doubt that the authority to purchase given the Secretary of War is sufficiently broad to authorize a purchase of petitioner's interest in land subject to perfecting the title through condemnation. The effect of such an agreement is to fix the value of the easement when the authority of the Court is invoked against a party to the agreement to acquire good title."

In the Danforth case the Government invoked the Flood Control Act, supra, and it was held that that Act determined the jurisdiction of the Court—that the cause was therefore not an action on contract. In the instant case, a different condemnation Act was invoked by the United States; but by the same reasoning, this is not an action on contract and was not so converted by the landowner in standing on the purchase contract. Instead, this proceeding is governed by the terms of the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a. That Act provides for the payment of interest on so much of the just compensation as is not deposited into Court from the date of taking to the date of payment. The Flood Control Act involved in the Danforth case has no such provision for taking possession, and possession was not taken prior to payment of the money. Consequently this Court in the Danforth case found there was no interest due, be-

cause possession not taken. This Court there pointed out, "Unless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action, we are of the view that the taking in a condemnation suit under this statutes takes place upon the payment of the money award by the condemnor." It should definitely be observed that this Court there said, "The Congress in other situations, has adopted the time of taking as the date for determination of value" and cited the Declaration of Taking Act as an example of this situation (l. c. 283-284).

Thus, it is clear, under the holding of this Court in the Danforth case, that the Declaration of Taking Act, being the Act invoked by the Government, controls the instant case as to the requirement of determining just compensation at the time of taking and the payment of interest on the amount withheld from the landowner from the time of taking to the date of payment. The Declaration of Taking Act specifically requires the payment of interest "on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment." Here the Government took actual possession on or about January 13, 1941. The deposit of $16,000, as estimated just compensation, was made on June 18, 1941. But it was not until May 17, 1945, that the Government deposited the remaining $18,000 in the registry of the District Court. There can be no question that upon the filing of the declaration of taking and the depositing of the estimated just compensation, the title was so irrevocably vested in the Government that the Government could not abandon the proceedings. The Circuit Court of Appeals for the Seventh Circuit said in United States v. Sunset Cemetery Co., 132 F. (2d) 163, 164:

> "Clearly under provisions of the statute, condemnation is effected and title completely vested in the Gov-

> ernment by the mere filing of a declaration of taking and a judgment adjudging title in the United States is wholly unnecessary. Such is the statutory mandate. It follows that from and after the vesting of title, the Government can be divested only by virtue of appropriate congressional authorization and not by an amended taking * * * Consequently the proceeding may not be subsequently abandoned so as to deprive the owner whose property has been taken of his constitutional right to have the damages assessed and paid in money."

Under the ruling of this Court in the Danforth case, the instant case clearly presents the following situation: The United States commenced these proceedings under the Declaration of Taking Act. Under that Act the value of the land could be fixed by a purchase contract and the landowner by standing on the purchase contract was not maintaining a suit on a contract so as to oust the District Court of jurisdiction by virtue of the Tucker Act, supra. The Declaration of Taking Act, not the Tucker Act, controlled the jurisdiction of the District Court. The Declaration of Taking Act requires the payment of interest from the date of taking to the date of payment on so much of the final award as was not made available to the landowner. The holding of the Circuit Court of Appeals, especially in holding that the landowner converted the action from a condemnation proceeding into an action on contract, is in direct conflict with the decision of this Court in Danforth v. United States.

If this cause had been converted into a suit on contract, the District Court would not have had jurisdiction under the terms of the Tucker Act because the amount involved is in excess of $10,000. This requirement as to amount is jurisdictional and one upon which the courts, on their own motion, must insist. Hammond-Knowlton v. United States, 121 F. (2d) 192, 202, cert. denied 314 U. S. 694. The Cir-

cuit Court of Appeals recognized that the Tucker Act was not applicable because, even though it held the action to be controlled by contract rather than the condemnation statute invoked, it nevertheless sustained the jurisdiction of the District Court by reversing the instant case and affirming Oliver v. United States, supra.

The observation of this Court in United States v. North American Transp. & Trading Co., 253 U. S. 330, should be noted. There, on the facts, interest was denied, but this Court said that interest could be collected "as a part of just compensation in condemnation proceedings brought by the government. For such a proceeding * * * is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant, and which the Government institut s in order to secure title to land." The instant case is such an adversary condemnation proceeding brought by the Government pursuant to the Declaration of Taking Act in which the owner is the defendant. A necessary step in such a condemnation proceeding is the determination of the value of the land at the time of the taking and the determination of the just compensation due the landowner, including interest, where there has been a denial of the use of the land and its money equivalent. This is an integral part of the condemnation proceeding. Here the Government itself moved the District Court to fix the landowner's compensation at the value fixed in the contract. The interest required to render just compensation was operative by the statute invoked by the Government. The whole process of condemnation, including that of fixing just compensation, is one continuous integrated process of litigation. Hopkins v. McClure, 148 F. (2d) 67, 70.

Indeed, where the Government has instituted condemnation proceedings the District Court then has exclusive jurisdiction over all matters involved in the condemnation

proceedings and the Court of Claims will not take jurisdiction of a suit in which the landowner seeks judgment on a claim allegedly arising out of the taking of the property involved in the condemnation proceedings. Dominion Smelting & Refining Corp. of N. J. v. United States, 102 Ct. Cl. 281. In that case the United States instituted condemnation proceedings pursuant to specified condemnation statutes and (after the condemnation proceedings were instituted, declaration of taking filed along with estimated just compensation and the order vesting title in the United States was entered) the owners of leasehold interests filed suit in the Court of Claims for damages incident to the condemnation. The Court of Claims refused to take jurisdiction of the suit filed there on the ground that the District Court had exclusive jurisdiction, it said:

> "Under these acts the only court in which condemnation proceedings could have been brought was in the court in which they were brought, to-wit, the District Court for the District of New Jersey. That court has full jurisdiction to render a judgment for just compensation for the property taken, and to distribute the proceeds of that judgment among the various persons having an interest in that property in accordance with their respective interests. Plaintiffs in that suit can assert every right they have for just compensation for the taking of their interest in the property.
>
> "Just compensation includes not only the value of the various interests taken, but also every other element which goes to make up just compensation. . . .
>
> . . . . . .
>
> "It is not our function, however, to determine in this suit what damages plaintiffs are entitled to recover. They can recover only because they are a part of the just compensation required by the Constitution to be paid for the taking of their property for public use. Transportation Co. v. Chicago, 99 U. S. 635; Gibson v. United States, 166 U. S. 269; Josten Co. v.

Providence, supra; Mitchell v. United States, supra; Sharp v. United States, 191 U. S. 341; United States v. Grizzard, supra. By the Act of August 1, 1888, supra, jurisdiction to determine this question is vested exclusively in the District Court in which the condemnation proceedings are filed.

"This court has jurisdiction to award judgment for just compensation for property taken and damages incident to the taking only where the property has been taken without the institution of condemnation proceedings. Condemnation proceedings have been instituted in these cases. The court in which they were instituted has exclusive jurisdiction."

Once the Government repudiated the purchase contract, after it had taken possession of the land, and instituted the adversary condemnation proceedings, it could not abandon that proceeding. United States v. Sunset Cemetery Co. (C. C. A. 7th), 132 F. (2d) 163. The landowner could not bring, even if he had wanted to, action in the Court of Claims. Under the ruling of this Court in Danforth v. United States, supra, the landowner by standing on the contract in the condemnation proceedings did not convert the action into one on contract. The governing statute was the Declaration of Taking Act pursuant to which the Government instituted the proceedings and took title. The provisions of that Act require the payment of interest. Because of the conflict between the decision of the Circuit Court of Appeals in the instant case with the decision of this Court in Danforth v. United States, supra, it is submitted that a writ of certiorari should be granted.

III.

There Is a Probable Conflict Between the Decision of the Circuit Court of Appeals and the Applicable Decisions of This Court in Jacobs v. United States, 290 U. S. 13, United States v. Rogers, 255 U. S. 163, and Other Condemnation Cases Holding That a Landowner Should Receive in Addition to the Value of the Land at the Time of Taking an Additional Amount Sufficient to Produce the Full Equivalent of That Value Paid Contemporaneously With the Taking.

There can be no question but that the Fifth Amendment of the Constitution requires the Government in a condemnation proceeding to compensate the landowner not only for the value of the land at the time of taking, but also an additional amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking. This Court has definitely established this principle in a considerable number of cases, and an examination of these cases reveals a conflict between the decisions of this Court and the decision of the Circuit Court of Appeals for the Eighth Circuit in the instant case.

In Jacobs v. United States, 290 U. S. 13, the United States constructed a dam which caused an increase in the occasional overflows of certain lands. The landowners and the Government were not able to reach a settlement, so the landowners brought separate suits under the Tucker Act, 28 U. S. C. A., Sec. 41 (20), to recover compensation for the property taken. The District Court found that the landowners were entitled to the amount of damage caused by the construction of the dam as of the date of its completion together with interest from the date of taking to the date of the entry of the judgment. The Circuit Court of Appeals reversed the District Court on

the ground that since the suits were not condemnation proceedings instituted by the Government, but were suits founded upon an implied contract, interest could not be allowed. This Court in reversing the Circuit Court of Appeals pointed out that the "remedy did not qualify the right" because the suits were founded upon the Constitution of the United States and summarized the applicable law as follows:

> "The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, 'and **no specific command to include interest is necessary** when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added.' Seaboard Air Line R. Co. v. United States, 261 U. S. 299, 306, 67 L. ed. 664, 669, 43 S. Ct. 354. That suit was brought by the owner under Sec. 10 of the Lever Act which, in authorizing the President to requisition property for public use and to pay just compensation, said nothing as to interest. But the Court held that **the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate.** See also United States v. Rogers, 255 U. S. 163, 169, 65 L. ed. 566, 568, 41 S. Ct. 281.
>
> "The principle was restated in Phelps v. United States, 274 U. S. 341, 71 L. ed. 1083, 47 S. Ct. 611. There the suit was brought in the Court of Claims, and that court gave judgment for the value of the property as it was found to be at the time of the requisition. Plaintiffs insisted that they were entitled to an additional amount to produce the equivalent of the value of the property 'paid contemporaneously' and

that, for this purpose, interest as a reasonable measure should be allowed. This Court sustained the claim. **The Court held that judgment in 1926 for the value of the use of the property in 1918 or 1919, without more, was not sufficient to constitute just compensation; that the claim was not for 'interest' within the meaning of Sec. 177 of the Judicial Code** (U. S. C., Title 28, Sec. 284) **and that that provision did not preclude the recovery of the additional amount asked.** To the same effect are Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 123, 68 L. ed. 934, 941, 44 S. Ct. 471; Liggett & M. Tobacco Co. v. United States, 274 U. S. 215, 71 L. ed. 1006, 47 S. Ct. 581."

In United States v. Rogers, 255 U. S. 163, the United States brought action on January 18, 1915 to condemn certain lands for reclamation purposes. The award of the Commission was filed February 3, 1915 and an order was entered July 27, 1915 by the District Court directing that the sums awarded be deposited and distributed for the benefit of the landowners. Subsequently, the owners made a motion for a supplemental order requiring the United States to deposit sums equal to 6% interest on the awards calculated from April 19, 1912, the time when the lands were taken by flooding and such an order was entered. This Court, in upholding the requirement of the payment of interest, said, at l. c. 568:

"Was there error in awarding the owners interest on the value of their lands appropriated from the time of actual taking of the same until compensation was made?

"It is unquestionably true that the United States, upon claims made against it, cannot, in the absence of a statute to that end, be subjected to the payment of interest. United States ex rel. Angarica v. Bayard, 127 U. S. 251, 260, 32 L. Ed. 159, 163, 8 Sup. Ct. Rep. 1156; United States v. North Carolina, 136 U. S. 211, 216, 34 L. Ed. 336, 338, 10 Sup. Ct. Rep. 920, cited and

approved in National Home v. Parrish, 229 U. S. 494, 496, 57 L. Ed. 1296, 1298, 33 Sup. Ct. Rep. 944. **In the present case the landowners did not sue upon a claim against the government,** as was the fact in United States v. North American Transp. & Trading Co., 253 U. S. 330, 64 L. Ed. 935, 40 Sup. Ct. Rep. 518. **The government was seeking, for purposes authorized by statute, to appropriate the lands, and it had actually taken them, and had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran.**

"Having taken the lands of the defendants in error, it was the duty of the government to make just compensation as of the time when the owners were deprived of their property. Monongahela Nav. Co. v. United States, 148 U. S. 312, 341, 37 L. Ed. 463, 473, 13 Sup. Ct. Rep. 622." (Emphasis supplied.)

Application of the same principle is to be found in a number of other decisions by this Court. See: Phelps v. United States, 274 U. S. 341; Brooks-Scanlon Corp. v. United States, 265 U. S. 106; Shoshone Tribe v. United States, 299 U. S. 476; Seaboard Air Line R. Co. v. United States, 261 U. S. 299; United States v. Klamath Indians, 304 U. S. 119.

Now the Circuit Court of Appeals below recognized the principle that a landowner is entitled to interest upon the fair value of the land from the date of the taking until payment, citing (R. 300) United States v. Rogers, supra, and Seaboard Air Line R. Co. v. United States, supra; but the Circuit Court of Appeals totally failed to apply that principle to the facts of the instant case.

There is only one conceivable factual difference between the instant case and the decisions by this Court cited above where this Court held that the Fifth Amendment required the payment of interest. Here the price or valuation of the land was fixed by contract at the time of the taking,

instead of being fixed by commissioners. While the Government repudiated the contract (R. 301) and instituted adversary condemnation proceedings, the fact is clear that it was the United States, on its own initiative before the District Court entered judgment, which moved the District Court to enter judgment in condemnation fixing the compensation of the landowner at the contract price of $34,000.00, because this Court in Muschany v. United States, 324 U. S. 49, held such option contracts "valid and binding". It should also be noted that the United States voluntarily deposited the $18,000 in the Court (R. 160) even before the District Court ruled on its motion. The District Court did enter judgment (R. 180) directing the just compensation of the landowner to be $34,000.00 in accordance with the contract along with $4,230.00, being the amount of interest at the rate of 6% per annum as provided in the Declaration of Taking Act, on $18,000.00 from June 18, 1941, the date of the order and judgment on declaration of taking (R. 140), to May 17, 1945, the date the $18,000.00 was deposited in the registry of the Court.

There is no dispute that from June 18, 1941 to May 17, 1945 the landowner was deprived both of the use of the land and of a portion of its money equivalent. There is no dispute that the land was taken. The Circuit Court of Appeals held that no interest was allowable in the instant case because "the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled * * * by the terms of the purchase contract". The Court said (R. 302):

> "By their successful defense of the validity of the purchase contract, the landowners converted the condemnation proceeding into one controlled, as to the amount of

their recovery, by the terms of the purchase contract. * * *

"The fact that the United States did not proceed with condemnation proceedings as contemplated by the purchase contract, but under the mistaken belief that the contract was void, cannot justify the award of interest not required by the contract. In the absence of a statute or an express contract providing for it, interest cannot be added to an obligation of the United States. * * * The allowance of interest upon the consideration stipulated in the purchase contract would be tantamount to awarding interest against the United States by way of damages for delay in payment of an obligation. '* * * interest does not run upon claims against the Government even though there has been a default in the payment of principle.' Smyth v. United States, 302 U. S. 329, 353."

This contention that the nature of the proceedings was converted into an action in contract so as to avoid the requirements of the Fifth Amendment and the condemnation statutes has been presented to this Court before and this Court has rejected the contention.

We have already pointed out (Point II) that in Danforth v. United States, 308 U. S. 271, this Court held, in an action commenced under a condemnation statute where the landowner stood on a contract fixing the price of the land, that the jurisdiction of the Court depends upon the language of the condemnation statute involked by the condemnor and not upon the Tucker Act. While this Court held that by reason of the terms of the statute controlling that case there was no taking until the payment of the award and therefore no interest was due, this Court also pointed out and cited the Declaration of Taking Act as an example of where Congress has by statute defined the doing of a specific thing as the determination of taking from which interest runs. The instant case presents pre-

cisely such a situation under the Declaration of Taking Act and under the terms of that Act on the facts here presented the landowner is entitled to interest.

Even in a situation where the Government does not institute condemnation proceedings and the landowner is forced to resort to the Tucker Act, this Court has held that interest is included in the right to just compensation. This was the situation in Jacobs v. United States, 290 U. S. 13, where the Circuit Court of Appeals on authority of United States v. North American Transp. & Trading Co., 253 U. S. 330, held that the suit was on implied contract and interest was not allowable. This Court reversed and held that the North American Transp. & Trading Co. case was not applicable because it was not founded upon the Fifth Amendment and that instead in suits founded on the Fifth Amendment the landowner "is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount to be added' ".

Nor does the fact, as contended by the Circuit Court of Appeals, that the contract did not specifically provide for interest defeat the right to interest. In the Jacobs case, supra, this Court said, 290 U. S. 13, 16-17:

> "The concept of just compensation is comprehensive and includes all elements, 'and no specific command to include interest is necessary * * *' the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate."

Moreover, since the condemnation statute invoked by the United States, which in this case was the Declaration

of Taking Act, controls the jurisdiction of the Court, Danforth v. United States, supra, and since the Declaration of Taking Act specifically provides for interest, there is a clear statutory requirement of interest. This was entirely ignored by the Circuit Court of Appeals.

It should be observed that the reason assigned by the Circuit Court of Appeals as to why the adversary condemnation proceedings were "converted" into an action on contract is not an accurate statement of fact. The Circuit Court of Appeals stated (R. 302) that the landowners: "By their successful defense of the validity of the purchase contract" converted the cause of action. The petitioner herein did neither more than allege in the answers to the petition in condemnation and the motion by the Government that the contract was valid and that the value was fixed by it (R. 143, 156). This is nothing more than the landowner did in Danforth v. United States, supra. This issue was not tried by the Government. It was the Government, after this Court had definitely settled the validity of such a contract in Muschany v. United States, 324 U. S. 49, who voluntarily moved (R. 154) the District Court that such option was valid and binding and that the District Court fix the just compensation at the agreed value. There was thus no dispute as to the validity and binding nature of the contract. Certainly under these circumstances it could not correctly be stated that there was a "successful defense". But, even if there had been a dispute which was litigated, the establishment of the price of the land at the time of the taking by the successful defense of an agreed valuation would still not constitute a conversion which would preclude the payment of interest. Danforth v. United States, supra.

Here, as in United States v. Baugh, 149 F. (2d) 190,

> "The stipulation merely had the effect of relieving the Government from having to make proof as to

what was just compensation and of running the risk of having an amount fixed which might be unsatisfactory. The stipulations eliminated controversies, but otherwise the condemnation suit proceeded to final judgment."

Since the option contract fixing the agreed purchase price is valid and binding and since the landowner was deprived of the use of his land and a portion ($18,000.00) of his money equivalent from June 18, 1941 to May 17, 1945, it is submitted that the holding of the Circuit Court of Appeals that the landowner is not entitled to interest as a portion of just compensation is in direct conflict with the applicable decisions of this Court.

IV.

The Declaration of Taking Act Requires the Payment of Interest. This Court Has Not Directly Decided Whether or Not This Requirement Is Avoided Because the Value of the Land Is Fixed by Contract.

The United States instituted these proceedings pursuant to the Declaration of Taking Act, 40 U. S. C. A., Sec. 258a, and said Act requires the payment of interest on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment except that interest shall not be awarded on so much thereof as shall have been paid into the court.

This cause involves an important question of Federal Law which has not been, but should be, decided by this Court of whether the United States can invoke the Declaration of Taking Act, acquire title of land pursuant to that Act, withhold a portion of an agreed purchase price fixed by a valid and binding option contract and still deprive the landowner of interest which the Act provides shall be paid him.

The United States deposited in the District Court on June 18, 1941 the sum of $16,000 as the estimated just compensation (R. 182). By this act the United States repudiated an option contract theretofore entered into between it and the landowner whereby the agreed purchase price or valuation of the land was fixed at $34,000. Although the landowner had proceeded to perform its obligations under the contract and the United States had taken possession of the land pursuant to the contract, the United States did not take title to the land pursuant to the contract. This it could have easily done by either of two methods. If the United States was satisfied with the title delivered by the owner it could have accepted that title and compensated the landowner in the agreed amount. Or, if not satisfied with the title, the United States could have, as provided in the contract, commenced condemnation proceedings and deposited in the court the agreed amount of $34,000 and a consent verdict would be entered in said amount. The United States chose not to acquire land by either of these methods. Instead it repudiated (R. 301) the contract and commenced adversary condemnation proceedings. It acquired title to the land by virtue of the "Order and Judgment On Declaration of Taking" (R. 140), filed by the District Court on June 18, 1941. That order vested title to the land in fee simple absolute in the United States upon the filing of the Declaration of Taking and the depositing of the estimated compensation. The Order recited that the Petition and Declaration of Taking "state the authority under which, and the public use for which, said land was taken; that said Declaration of Taking was signed by the Secretary of War of the United States, who was, and is, duly authorized and empowered by law to acquire the land described in said petition" (R. 140). The Court directed that "the amount of just compensation for said land involved in this con-

demnation proceeding, shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law" (R. 142).

Having acquired title, the next question was the ascertainment of the valuation of the land as of the time of the taking. While the landowner by its answer brought this question to issue by alleging that the contract price of $34,000 determined the value of the land and the time of the taking from which he was entitled to interest, it was the United States itself that moved (R. 154) the District Court to the effect that the United States "had executed an option contract for the purchase * * * from the defendants the said real estate for the sum of $34,000.00, being the amount of compensation fixed in said option contract," and that said option was "valid and binding." It is significant that the United States moved the Court "to enter judgment in this cause for the **condemnation** of the said real estate, **fixing the compensation** to be paid by plaintiff to the defendants **in the sum of $34,000**" (R. 155).

Here the cause was at all times a condemnation proceeding and the condemnation statute invoked (the Declaration of Taking Act, 40 U. S. C. A., Sec. 258a) expressly provides for the payment of interest. **Can the United States invoke such a statute, acquire title to land for public use under such statute, move for the fixing of the compensation at a specified contract price of $34,000 and then avoid payment of interest for a period of almost four years when the statute specifically requires the payment of interest?** If the United States is able to frustrate the very purpose of the statute, it will destroy the guarantee of just compensation found in the Fifth Amendment to the Constitution. This it can do, if the technique adopted by the government in this condemnation is followed, by simply obtaining contracts and taking possession, then waiting any length of time it desires before commencing condem-

nation proceedings in which it would move for entry of judgment at the contract price. The Constitutional right to just compensation should not be so ludicrously defeated.

The very purpose of the Declaration of Taking Act was to relieve the Government from the burden of interest while at the same time protecting the right of the landowner to just compensation, including interest. This Court said in United States v. Miller, 317 U. S. 369, 381:

> "The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and **to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment** in the eminent domain proceeding. Second, to give the former owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate of the value of the property. **The Act recognizes that there may be an error in the estimate** and appropriately provides that, if the judgment ultimately awarded shall be in excess of the amount deposited, **the owner shall recover the excess with interest.**"

In the instant case there was a substantial error in the estimated just compensation, which the Circuit Court of Appeals assigned to "the mistaken belief that the contract was void" (R. 362), but it was the United States that moved the District Court that the option contract was "valid and binding." Obviously, the "agreed purchase price" or "agreed valuation", as the contract terms the $34,000, was the valuation as of the time the contract was entered into and the possession of the land acquired. "The just compensation Constitutionally required is not the same thing as the sale price of a capital asset." Kieselbach v. Commissioner of Internal Revenue, 317 U. S. 399. Moreover, the Declaration of Taking Act provides for the payment of interest in just such a situation where an error

has been made. The money deposited with the declaration of Taking is not accepted in full of the demand. As said by the Circuit Court of Appeals for the Fifth Circuit in Atlantic Coast Line R. Co. v. United States, 132 F. (2d) 959: "The money thus deposited is not offered or accepted as in full of the demand, but is without prejudice and only to escape liability for accruing interest." In the instant case the District Court properly ordered at the time the title was vested in the United States that the just compensation "shall be ascertained and awarded in said proceeding * * * pursuant to law" and it is submitted that the District Court properly applied the law established under the Fifth Amendment and by the Declaration of Taking Act.

When the United States repudiated the option contract and commenced action pursuant to the Declaration of Taking Act by filing the declaration of taking, the condemnation was then "effected and title completely vested in the Government by the mere filing of a declaration of taking." The Government could not subsequently abandon the proceeding "so as to deprive the owner whose property has been taken of his constitutional right to have the damages assessed and paid in money." United States v. Sunset Cemetery Co. (CCA 7th), 132 F. (2d) 163. Nor could the landowner, after the Government invoked the exclusive jurisdiction of the District Court under the Declaration of Taking Act, bring a cause of action in the Court of Claims under the Tucker Act for any claims arising out of the condemnation. The Court of Claims would not have jurisdiction of such action. Dominion Smelting & Refining Corp. of N. J. v. United States, 102 Ct. Cl. 281. It is thus seen that the only forum in which the landowner could stand on the option contract was in condemnation suit instituted by the United States and the terms of the condemnation act invoked by the Government control the jurisdiction of the court and the proceedings. Dan-

forth v. United States, 308 U. S. 271. This clearly raises the question of the application and meaning of the Declaration of Taking Act.

The Circuit Court of Appeals, instead of deciding the instant case as a condemnation proceeding held that it had been converted from such into an action on contract.

Having taken the position that the proceeding was one on contract the Circuit Court of Appeals stated:

> "The allowance of interest upon the consideration stipulated in the purchase contract would be **tantamount** to awarding interest against the United States by way of damages for delay in the payment of an obligation. '* * * interest does not seen upon claims against the Government even though there has been a default in the payment of the principal.' Smyth v. United States, 302 U. S. 329, 353."

The Circuit Court of Appeals has unquestionably confused the nature of these condemnation proceedings and the nature of a suit on an obligation of the United States. Smyth v. United States, 302 U. S. 329, was not concerned with a factual situation at all comparable with the facts here presented. The Circuit Court of Appeals recognized that the facts here involved do not actually present a situation where interest would constitute damages for delay in the payment of an obligation because it uses the word "tantamount"—which means that it is not the same, but is "equivalent in value." Moreover the Circuit Court of Appeals' reliance on the quoted sentence of Smyth v. United States, supra, leads it to ignore the repeated distinctions drawn by this Court between condemnation proceedings and other types of proceedings. Thus in United States v. North American Transp. & Trading Co., 253 U. S. 330 (cited and relied upon in Smyth v. United States, supra), a landowner brought a suit on an implied contract in the Court of Claims and sought inter-

est. This Court in holding that interest was not allowable on the facts in that case points out (l. c. 337) nevertheless that **interest could be collected "as a part of just compensation in condemnation proceedings brought by the government. For such a proceeding * * * is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant, and which the government institutes in order to secure title to land."** The facts of the instant condemnation case certainly bring it within the situation where interest is Constitutionally required and not within the situation where it is not allowable. This Court has repeatedly pointed out that United States v. North American Transp. & Trading Co., supra, was not a condemnation proceeding and that while interest was not allowed there, it is allowable in condemnation proceedings. Thus in Jacobs v. United States, this court in holding interest allowable said, 290 U. S. 13, 18:

> "The case of United States v. North American Transp. & Trading Co., 253 U. S. 330, 64 L. ed. 935, 40 S. Ct. 518, supra, cannot be regarded as establishing a different rule for the instant case. See Seaboard Air Line R. Co. v. United States, supra (261 U. S., p. 305, 676 L. ed. 669, 43 S. Ct. 354); Phelps v. United States, supra (274 U. S., pp. 343, 344, 71 L. ed. 1084, 1085, 47 S. Ct. 611). The North American Transp. & Trading Co. case rested upon its special facts. * * * The court said that the suit was not founded upon the Fifth Amendment. 253 U. S., pp. 334, 335. Suits brought to enforce the constitutional right to just compensation are governed by the later decisions which are directly in point."

This Court has not decided the question of whether the express provisions of the Declaration of Taking Act requiring the payment of interest for delay in payment of a portion of the just compensation can be defeated simply

because the agreed purchase price or valuation of the land was fixed by an admittedly valid and binding option contract and which agreed purchase price the landowner pleaded as the value of the land at the time of the taking. In Danforth v. United States, 308 U. S. 271, this Court held that the provisions of the condemnation statute invoked by the Government controlled the jurisdiction of the Court rather than the terms of the Tucker Act where the landowner in his answer pleaded a comparable contract fixing the price of the land. While in that case it was held that under the provisions of the condemnation statute invoked and the facts presented no interest was allowable, this Court pointed out in dictum that Congress in the Declaration of Taking Act fixed the time of taking as the date for determination of value.

Since the United States instituted this suit pursuant to the Declaration of Taking Act, acquired title to the land under the terms of that Act and pursued the suit to its conclusion in the District Court under that Act and since the Circuit Court of Appeals failed and refused to affirm the judgment of the District Court allowing interest in accordance with the provisions of that Act and the Fifth Amendment of the Constitution, it is submitted that this cause presents an important Federal question which should be decided by this Court.

As we have indicated, we believe the reasoning of this Court in Danforth v. United States, supra, applies to the instant case so that the payment of interest is required by the terms of the Declaration of Taking Act. Since, however, that case did not directly involve the Declaration of Taking Act, we submit that the court should remove all doubt and directly decide the questions here presented under the Declaration of Taking Act.

During this past war and the period preceding it, the United States condemned large amounts of land to build defense and military facilities. Much of this land was

acquired by means of options or purchase contracts such as here used. Unless this Court settles the application of the Declaration of Taking Act to such options, there will be much confusion and litigation concerning the rights of landowners under such options and the Declaration of Taking Act.

CONCLUSION.

For the reasons stated, it is respectfully submitted that a writ of certiorari should be issued out of this Court to review the judgment entered herein by the Circuit Court of Appeals for the Eighth Circuit.

Respectfully submitted,

ROSCOE ANDERSON,
705 Olive Street,
St. Louis 1, Missouri,
Attorney for Petitioner.

Of Counsel:

WILLIAM WAYE, JR.,
First National Bank Building,
St. Charles, Missouri,

W. R. GILBERT,
705 Olive Street,
St. Louis 1, Missouri.